CF0000058226

(2)

IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

Criminal Appeal 864/1995

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Division Bench (Criminal)

APPELLANT (In jail) : Shobhnath S/O Mangal Bargah aged about 23 years, R/O Village Civildang, P.S. Kusmi Distt. Surguja M.P.

Versus

RESPONDENT : State of Madhya Pradesh through P.S. Kusmi Distt. Surguja M.P.

CRIMINAL APPEAL U/S 374(2) OF THE CODE OF CRIMINAL PROCEDURE 1973

(7)

(18) A.F.R.

HIGH COURT OF JUDICATURE AT BILASPUR

(CHHATTISGARH)

DIVISION BENCH*:
HON'BLE SHRI L.C. BHADOO &
HON'BLE SHRI V.K. SHRIVASTAVA JJ.

CRIMINAL APPEAL No.864 OF 1995

Shobhnath

Versus

State of M.P. (now Chhattisgarh)

JUDGMENT FOR CONSIDERATION

Sd/-
L.C. Bhadoo
Judge

HON'BLE MR. JUSTICE V.K. SHRIVASTAVA

I agree

Sd/-
V.K.Shrivastava
Judge

POST FOR JUDGMENT ON 23rd DECEMBER, 2005

Sd/-
L.C.BHADOO
Judge

22.12.2005

A.F.R.

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.864 of 1995

Shobhnath

- Versus -

State of Madhya Pradesh (now Chhattisgarh)

Present: -

Mr. A.K. Prasad, Advocate : For the appellant.

Mr. G.K. Beriwal, Additional Public Prosecutor with Mr. Ravindra Agarwal, Panel Lawyer : For the respondent.

DIVISION BENCH: -

HON'BLE MR. L.C. BHADOO AND

HON'BLE MR. V.K. SHRIVASTAVA JJ.

J U D G M E N T

(Delivered on 23rd December, 2005)

The following judgment of the Court was delivered by L.C. Bhadoo, J:-

1. By this appeal accused Shobhnath has questioned the legality of judgment of conviction & sentence dated 1.6.1995 passed by learned Sessions Judge, Ambikapur District Sarguja in Sessions Trial No.381/94 whereby learned Sessions Judge after holding the accused guilty for commission of murder of Billiya Bai convicted him under Section 302 of the Indian Penal Code and sentenced him to undergo imprisonment for life.

2. The prosecution case, in brief, is that Tenai, father of Kumari Billiya, gave merg intimation (Ex.P-10) in the Police Station Kusmi, District Sarguja on 22.7.1994 to the effect that on 17.7.1994 at about 9.00 p.m. in the night after taking dinner Kumari Billiya along with her elder sister namely Budhni went for sleep in a separate room, he also went for sleep in his room and his wife had gone to Village Bhawanipur. At about 12.00 in the midnight Budhni informed him that Billiya is not in the house, therefore, a search was made by him in the night to trace Billiya. He also enquired from the relatives, but Billiya could not be

traced out. Today at about 3.30 p.m. Faiku came and informed him that a dead body of female is lying near the Galphula drain (Nala) and flesh of legs & hands have been eaten by the wild animals, however, her face is intact and from the face it can be identified that the body is of Billiya Bai. Kumari Billiya Bai was having illicit relations with Shobhnath and she was pregnant by four months. A Panchayat in the village was convened in which Shobhnath was also called and on enquiry, he informed that in the fateful night Billiya Bai came to his house and in the same night he left Billiya Bai near her house. On receiving the merg intimation, Dehati Nalishi (Ex.P-13) was prepared and based on that F.I.R. (Ex.P-13A) was registered. The Investigating Officer left for the scene of occurrence and after giving notice to the Panchas (Ex.P-3) prepared the Panchnama (Ex.P-4) of the body. Dead body of Billiya Bai was sent for postmortem examination to the Primary Health Centre, Kusmi, where PW-6, Dr.T.Sai conducted the postmortem on the body of deceased Billiya Bai and prepared the postmortem report Ex.P-8 in which he opined that cause & mode of death is not known in absence of vital organs & bones and duration of death is about 6-7 days. Site plan (Ex.P-12) was also prepared by the Investigating Officer. During investigation it was found that Billiya Bai was having illicit relations with Shobhnath and in the fateful night she went to house of accused Shobhnath from where Shobhnath took her towards the Galphula Drain (Nala) and pushed her in the drain.

3. After completion of investigation, the charge sheet was filed in the Court of learned Chief Judicial Magistrate, Ambikapur, who in turn committed the case to learned Sessions Judge, Ambikapur for trial.

4. The prosecution in order to prove the charge against the accused examined 10 witnesses. The statement of accused was also recorded by learned Sessions Judge under Section 313 of the Cr.P.C. in which he denied the material appearing against him and stated that he is innocent and has been

falsely implicated in the crime and the witnesses had deposed against him on account of the animosity.

5. Learned Sessions Judge after hearing the arguments of Additional Public Prosecutor and counsel for the accused, convicted and sentenced the accused in the manner as mentioned in Para-1 of this judgment.

6. We have heard Mr. Prasad, learned counsel for the accused/appellant & Mr. Beriwal, Additional Public Prosecutor with Mr. Agarwal, Panel Lawyer for the State/respondent.

7. As far as the question of involvement of accused/appellant in committing the murder of Kumari Billiya Bai is concerned, learned counsel for the accused/appellant argued that the whole case rests on the circumstantial evidence, there is no direct evidence in this case and as per prosecution case itself Kumari Billiya Bai left her paternal house in the night of 17.7.1994, whereas her dead body was found on 22.7.1994 near the Galphula Drain (Nala) and there is no evidence that what happened in between i.e. between 17th to 22nd July, 1994. He further argued that even the doctor (PW-6) could not give the definite opinion regarding cause of death on account of missing of limbs and body was eaten by the wild animals.

8. On the other hand, learned Additional Public Prosecutor for the State supported the judgment of the trial Court.

9. Having heard learned counsel for the parties, we have perused the impugned judgment and evidence available on record. It is true that the whole case rests on the circumstantial evidence and there is no direct and ocular evidence in this case to connect the accused/appellant with the crime in question. In order to convict an accused based on the circumstantial evidence, the Hon'ble Apex Court in the matter of **Dhananjoy Chatterjee Vs. State of W.B.** reported in **(1994) 2 SCC 220** has held that;

> "In a case based on circumstantial evidence, the circumstances from which

> the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof."

10. Now, we shall proceed to examine the evidence, which has been adduced by the prosecution in order to connect the accused/appellant with the crime in question i.e.

- The deceased Kumari Billiya Bai was last seen together alive with the accused/appellant in the night of 17.7.1994.

- The accused/appellant was having illicit relations with deceased Billiya Bai, on account of that she was pregnant by four months and as such deceased Billiya Bai was pressing him to keep her as his wife and as the accused/appellant was already married, therefore, in the fateful night, accused/appellant took Billiya Bai towards Galphula drain (nala) and committed her murder by pushing her in the said Galphula Nala.

11. As far as Point No.1 is concerned, PW-2 Parvati-mother of accused/appellant, even though she has turned hostile, has stated in her evidence that in the fateful night she along with her husband, accused/appellant and his wife namely

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Savatri was at her residence. Deceased Billiya Bai came to her residence in the night, thereafter accused/appellant went out of the house along with Billiya Bai and at about 12.00 in the midnight he returned. In the cross-examination by the Additional Public Prosecutor this witness has further stated that accused/appellant went with Billiya Bai to leave her at her residence and later on, she came to know that dead body of Billiya Bai was found in the drain. The distance from her house upto Galphula drain is of one hour. It is also correct that Billiya Bai was pregnant on account of physical relations with the accused. PW-3 Bhagal has also turned hostile and he has not supported the prosecution case. PW-5 Ramsai, who was Sarpanch of Village Civildaang, has stated that the Panchayat was convened on the request of Tenai (PW-8), father of deceased Billiya Bai, as Tenai was suspecting Shobhnath behind the murder. This witness has also turned hostile, however, in the cross-examination by learned Additional Public Prosecutor he has stated that before the Panchayat accused Shobhnath had admitted that in the Sunday night Billiya came to his house and thereafter he dropped her near the culvert by a cycle. PW-7 Narayan Ram has also stated that a Panchayat was convened on the request of Tenai- father of Billiya Bai, in which accused Shobhnath was also called and he admitted that he was having illicit relations with Billiya Bai since last two years. This witness has also turned hostile. PW-8 Tenai, father of deceased has stated that accused Shobhnath was having illicit relations with his daughter, he used to roam along with his daughter, she was pregnant by four months on account of physical relations with the accused and before the Panchayat accused Shobhnath had admitted the relations with his daughter and he also informed the Panchayat that he went along with Billiya Bai in the fateful night upto the culvert. PW-9 Savitri Bai, wife of accused/appellant, has also turned hostile and she has not supported the prosecution case.

12. The law regarding connecting an accused with the crime based on the last seen theory, as has been laid by the

Hon'ble Apex Court in the matter of **BODHRAJ ALIAS BODHA AND OTHERS Versus STATE OF JAMMU & KASHMIR** reported in **(2002) 8 SCC 45**, is that;

> "the theory of last seen comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be hazardous to come to a conclusion of guilt in cases where there is no other positive evidence to conclude that the accused and the deceased were last seen together."

In the matter of **Subhash Chand Vs. State of Rajasthan** reported in **(2002) 1 Supreme Court Cases 702** the Hon'ble Apex Court has held that;

> ".....To constitute evidence of last seen together, the evidence must definitely permit an inference being drawn that the victim and the accused were seen together at a point of time in close proximity with the time and date of commission of crime...."

In the matter of **State of Karnataka Vs. M.V. Mahesh** reported in **(2003) 3 Supreme Court Cases 353** the Hon'ble Apex Court has held that:

> "..... Merely being seen last together is not enough. What has to be established in a case of this nature is definite evidence to indicate that Beena had been done to death of which the respondent is or must be aware as also proximate to the time of being last seen together...."

13. In view of the above law laid down by the Hon'ble Apex Court before convicting an accused based on the last seen together theory, the Court is required to ascertain from the legal clinching evidence that the time-gap between the point of time when the deceased and the accused were seen last together alive and the death of deceased must be so close and proximate that an inference regarding the guilt of accused can be drawn and there is no possibility of coming any third person in between the last seen together and death of the deceased. There must be unerringly clinching legal evidence that should point towards the involvement of the accused in commission of murder. Further it is unsafe to convict a person based on the last seen theory unless the last seen coupled with other circumstances is indicator of the fact that the accused is the author of the crime. Based on this principle if we look into the above evidence, from the evidence of mother of accused namely Parwati (PW-2) and PW-5 Ramsai, Sarpanch of Village who convened the Panchayat, it is established that the accused/appellant had admitted that deceased Billiya Bai came to his house in the night of Sunday i.e. on 17.7.1994 and thereafter he along with Billiya Bai left the house and accused/appellant returned in the same night all alone. However, the body of deceased was found in dead condition on 22.7.1994. Whether based on the above fact the accused/appellant can be connected with the crime in question shall be dealt with later on?

14. As far as the second point is concerned, regarding this fact also there is evidence on the record that the accused/appellant was having illicit relations with Billiya Bai (since deceased) and she was pregnant by four months. This fact can be inferred from the evidence of PW-2 Parvati, mother of accused in which she has stated that the Billiya Bai came to their house and from there accused/appellant left along with Billiya. PW-4 Mukund, who was present in the Panchayat, has stated that the accused has admitted in the Panchayat that he was having illicit relations with Billiya Bai. PW-5 Ramsai has stated that the accused

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admitted before the Panchayat that he was having illicit relations with Billiya Bai and PW-7 has corroborated the above evidence. PW-8 Tenai, father of deceased has stated that accused Shobhram was having illicit relations with her daughter Billiya Bai. Therefore, this fact stands established from the above evidence that the accused/appellant was having illicit relations with Billiya Bai.

15. Now based on the principle laid down by the Hon'ble Apex Court in the *Dhananjoy Chatterjee's case* we have to examine whether the prosecution has been able to establish crime against the accused/appellant. It is true that it has been proved by the prosecution that in the night of 17.7.1994 deceased came to the house of accused, from where accused & deceased left together and thereafter accused returned in the night to his house after leaving Billiya Bai. It is also established that the accused/appellant was having illicit relations with Billiya Bai. Now the question remains that whether on the above facts it can be inferred that the accused was the author of crime in question. If we look into the totality of facts and circumstances of the case, we are of the considered opinion that the prosecution has not been able to connect the accused with the murder of Billiya Bai, for the reasons, there is nothing on record to show that the accused/appellant had ever any intention/plan to commit murder of Billiya Bai and there is nothing on record which indicate that why the accused/appellant had committed murder of Billiya Bai. It is true that in Sunday night accused left with Billiya Bai from his house where Billiya Bai came, thereafter he returned all alone and the explanation given by the accused/appellant in this regard before the Panchayat was that he left Billiya Bai near the culvert to ensure that she went back to her house. Dr.T.Sai (PW-6) who conducted the postmortem has not been able to establish through medical evidence i.e. postmortem report that Billiya Bai was murdered and what was the cause of death. When Tenai (PW-8) was knowing fully well that Billiya Bai and the accused was having illicit relations, she left the

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house in the night of 17.7.1994 and she did not return and her whereabouts were not known, then why he had not lodged the report in the police station on 18.7.1994 and why he had waited for five days till the body of Billiya Bai was found in the Galphula drain (nala). The possibility of the fact cannot be ruled out that when the accused left Billiya Bai, she out of frustration must have gone somewhere else and thereafter she died. As has been held by the Hon'ble Apex Court that for connecting an accused in a crime based on the circumstantial evidence each of the circumstance must be independently proved and chain of all the circumstances must be established that should point towards the guilt of the accused and there is no possibility of innocence of the accused and involvement of any other person in crime in question.

16. Looking to the time-gap between the point of time when Billiya Bai was found missing and her dead body was found, cause of death could not be ascertained by the medical evidence and there is nothing on record which establishes that the accused was determined to finish Billiya Bai, we are of the considered opinion that the prosecution has not been able to establish the crime against the accused/appellant based on the circumstantial evidence. Therefore for the above reasons, the finding of the trial Court convicting the accused/appellant for committing the murder of Billiya Bai cannot be sustained.

17. In the result, the appeal succeeds and same is allowed. Appellant Shobhnath is acquitted of the charge under Section 302 of the Indian Penal Code and conviction & sentence imposed upon him are hereby set aside. Appellant Shobhnath be set at liberty forthwith if not required in any other case.

Sd/-
L.C. Bhadoo
Judge

23.12.2005

Sd/-
V.K.Shrivastava
Judge

23-12.2005

Roshan/-